

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANNY L. CORBY)	
Claimant)	
VS.)	
)	
ST. JOHN WELDING & MFG.)	Docket No. 199,626
Respondent)	
AND)	
)	
ITT HARTFORD)	
Insurance Carrier)	

ORDER

The application of the respondent for review of an Award entered by Administrative Law Judge Bruce E. Moore dated May 28, 1997, came on for consideration before the Workers Compensation Appeals Board.

APPEARANCES

Claimant appeared by and through his attorney, Andrew E. Busch of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Robert G. Martin of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant sustained personal injury by accident arising out of and in the course of his employment on February 17, 1994, when lifting a 400-pound combine component. Claimant suffered injury to his lower back with radiculopathy to his left leg. Claimant was treated conservatively by Gregg M. Snyder, M.D., board-certified orthopaedic surgeon, without success. Physical therapy proved unhelpful and claimant underwent an interlaminar microdisectomy at L4-5 on the left side on December 6, 1994. Following surgery, claimant developed complications which did ultimately resolve and claimant was found to have reached maximum medical improvement on February 22, 1995. Claimant experienced very little symptomatic relief from the surgery but Dr. Snyder expressed concerns that some of claimant's subjective symptoms and his abnormal posture may have been due either to conscious or unconscious symptom magnification. Based upon claimant's objective findings, Dr. Snyder felt that claimant had suffered a 15 percent functional impairment to the body as a whole and imposed restrictions of no vertical lift of more than 20 pounds and advised claimant avoid repetitious twisting, turning, bending, and prolonged sitting or standing.

Claimant was evaluated at his attorney's request by Jerry D. Hardin, a vocational consultant, and Dr. Snyder essentially adopted Mr. Hardin's assessment that claimant retained the ability to perform 4 out of 11 identified job tasks resulting in a task loss of approximately 64 percent.

Claimant was evaluated by Karen Terrill, a vocational consultant, at respondent's request. Dr. Snyder also had the opportunity to review, and agreed with, Ms. Terrill's analysis that claimant had the ability to perform 5 out of 12 identified job tasks resulting in a task loss of 58 percent.

Robert A. Rawcliffe, M.D., examined and evaluated claimant and opined that claimant had a 10 percent impairment of function to the body as a whole as a result of the injuries in question. Dr. Rawcliffe also felt that some of claimant's subjective symptoms were not explainable on an organic basis and felt claimant may have been engaging in either conscious or unconscious symptom magnification. He recommended claimant lift no more than 20 pounds on an occasional basis, 10 pounds on a frequent basis, and avoid repetitive bending, crouching, or stooping. Dr. Rawcliffe reviewed both the report of Karen Terrill and of Jerry Hardin and adopted the report of Ms. Terrill in finding a 58 percent task loss. He also considered Mr. Hardin's report and, with the noted exception of dealing with

claimant's ability to drive a truck, found claimant capable of performing 3 out of 11 identified job tasks resulting in a 73 percent task loss.

The Administrative Law Judge, in considering the opinions of the experts and the physicians, found claimant had suffered a 66 percent task loss as a result of the February 17, 1994, accident and resulting injuries. The Appeals Board finds that conclusion to be supported by the evidence and adopts same as its own finding.

With regard to the claimant's functional impairment, the Appeals Board finds the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. Considering the opinions of both Dr. Snyder and Dr. Rawcliffe, the Appeals Board affirms the finding that claimant had a 12.5 percent impairment of function to the body as a whole.

The Appeals Board must next consider the loss of wages suffered by claimant as a result of this injury. K.S.A. 44-510e in effect on February 17, 1994, requires consideration of not only the loss of task performing ability suffered by claimant but also requires a comparison of the claimant's wages on the date of accident with the wages he is earning subsequent to the accident. The Administrative Law Judge, in assessing claimant a 100 percent wage loss, refused to accept respondent's argument that Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) should apply as claimant had not been offered an accommodated position by respondent.

The Appeals Board acknowledges the philosophy of Foulk does not apply to this particular situation because claimant was not offered a comparable wage job. See Bohanan v. USD 260, No. 75,607 (Kan. App. 1997). However, subsequent to the issuance of this Award by the Administrative Law Judge, the Kansas Court of Appeals issued its decision in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997). In Copeland, the Court of Appeals was asked to consider whether a claimant's failure to make a good-faith effort to find appropriate employment would apply to the language of K.S.A. 44-510e for an accident subsequent to July 1, 1993. The Court of Appeals found that in attempting to harmonize the language of K.S.A. 44-510e with the principles of Foulk, a fact-finder must decide if a claimant has made a good-faith effort to find appropriate employment. If a good-faith effort has not been made, then the fact-finder is required to determine an appropriate post-injury wage based upon all the evidence before it, including expert testimony concerning the capacity to earn wages.

In this instance, claimant failed to complete a single written job application for any employer subsequent to his release to return to work. Claimant informally approached three employers and unilaterally determined that he could not perform those jobs considering his restrictions. When claimant was asked if he could work at a job which would require him only to work at a counter where he would alternate sitting on a stool and standing as he pleased, claimant responded that he could not do that job because it

involved too much sitting. In applying the principles set forth in Copeland to this matter, the Appeals Board finds that claimant has not made a good-faith effort to locate employment subsequent to his release to return to work and as such a post-injury wage must be determined based upon the evidence in the record.

Jerry Hardin felt claimant had a 100 percent wage loss, as he considered claimant's lack of income to be determinative in this matter. The Appeals Board rejects that opinion as it carries no indication regarding claimant's ability to earn wages. Karen Terrill indicated claimant is capable of earning \$320 per week post-injury which, when compared to the average weekly wage of \$405.64 results in a 21 percent wage loss. Considering the additional benefits properly computed by the Administrative Law Judge equating to an average weekly wage of \$462.96, this results in a wage loss of 31 percent. Therefore, the Appeals Board finds, that in following the principles of Copeland, claimant suffered a 21 percent wage loss prior to the inclusion of the fringe benefits in his average weekly wage and a 31 percent wage loss subsequent to the inclusion of same.

In considering the 66 percent task loss assessed by the Administrative Law Judge, the Appeals Board finds claimant has suffered a 43.5 percent work disability without including fringe benefits and a 48.5 percent work disability during the period of time the additional compensation is included in claimant's average weekly wage.

In all other regards the Award of the Administrative Law Judge is affirmed insofar as it is not in contravention to the opinions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated May 28, 1997, should be, and is hereby, modified and an award is granted in favor of the claimant, Danny L. Corby, and against the respondent, St. John Welding & Manufacturing, and its insurance carrier, ITT Hartford.

Claimant is entitled to 10.43 weeks temporary total disability compensation at the rate of \$270.44 per week in the amount of \$2,820.69 followed by 13.43 weeks temporary total disability compensation at the rate of \$272.57 per week in the amount of \$3,660.62 followed thereafter by 39 weeks temporary total disability compensation at the rate of \$308.66 per week in the amount of \$12,037.74; followed by compensation at the rate of \$308.66 per week for 178.06 weeks in the amount of \$54,960.00 for a 48.5% permanent partial disability, for a total award of \$73,479.05.

As of November 7, 1997, there would be due and owing to claimant 62.86 weeks temporary total disability compensation as above listed in the sum of \$18,519.05 followed by 131.28 weeks permanent partial disability compensation at the rate of \$308.66 in the amount of \$40,520.88, for a total due and owing of \$59,039.93 which is ordered paid in

one lump sum minus amounts previously paid. Thereafter the remaining amount of \$14,439.12 is to be paid at the rate of \$308.66 per week until fully paid or until further order of the Director.

In all other regards the Award of the Administrative Law Judge is affirmed insofar as it is not in contravention to the opinions expressed herein.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Owens, Brake, Cowan & Associates	
Preliminary Hearing Transcript	\$185.40
Regular Hearing Transcript	325.80
Motion Hearing Transcript	69.38
 Dauphin & Rodgers - Reporting & Video	
Deposition of Dr. Gregg Snyder	\$290.50
 Schaefer Court Reporting	
Deposition of Jerry Hardin	\$175.90
 Don K. Smith & Associates	
Deposition of Dr. Robert Rawcliffe	\$180.22

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Wichita, KS
Robert G. Martin, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director